Supreme Court, U.S.
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No. 92-800

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION,
Petitioner,

v.

KATHLEEN E. LES; FRANCES LES THOMAS;
MANUEL JESUS PEREZ MORALES; DAVID R. PEREZ;
MANUEL R. PEREZ,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY

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PETITIONER'S REPLY

I. Federal Respondents' tepid opposition to the certiorari petition not only is unpersuasive, but also completely contradicts the position that EPA and the Justice Department took after the court of appeals rendered its opinion, and reverses the Solicitor General's previous position on Supreme Court review of the important issue in this case.

1. Federal Respondents now assert that this case does not warrant further review, but less than four months ago, they sought and obtained a stay of mandate on the ground that the issues in this case are "of exceptional importance in terms of food safety and are worthy of Supreme Court review." Resp. Motion for Stay of Issuance of Mandate at 5 (filed in *Les v. Reilly*, No. 91-70234) (9th Cir. Oct. 1, 1992)). They argued that

> *EPA has sound legal reasons on which to seek Supreme Court review and the critical impact that the Court's decision will have on the regulation of pesticides in this country makes this case worthy of such review.* Moreover, EPA seeks this stay not for purposes of delay, but to ensure that the important legal issues raised by the panel's decision which may affect dozens of pesticide food uses and the future implementation of FFDCA and [FIFRA], across the country, *are fully and finally resolved in the context of further appellate review* before EPA is required to take action having potentially significant and far-reaching social and economic impacts.

Id. at 2-3 (emphasis added). EPA Administrator Reilly voiced his concern that "[t]he consequences of [the Ninth Circuit's] decision are potentially far-reaching and profound," and urged the Solicitor General to seek review. William K. Reilly, Remarks at the National Agricultural Chemicals Association Annual Meeting 3 (Sept. 28, 1992) (transcript available from EPA Office of Administrator); *Supreme Court Review Needed of Delaney Clause Case, Reilly Tells NACA*, 189 Daily Env't Rep. (BNA) A-7 (Sept. 29, 1992).

The government's refusal to seek certiorari is particularly puzzling in view of the fact that in March 1988 it opposed certiorari in a case involving FDA's *de minimis* exception to the color additive Delaney clause on the ground that this Court should await a case involving pesticide residues and EPA's *de minimis* exception to the food additive Delaney clause. *See* Br. for the Fed. Resp. in Opp. at 9 (filed in *Cosmetic, Toiletry and Fragrance Ass'n v. Public Citizen*, No. 87-1194) (Mar. 1988)). This is that case!

2. Federal Respondents concede in their opposition that they disagree with the Ninth Circuit's decision, but now claim that "the decision below is consistent with the D.C. Circuit's decision in *Public Citizen v. Young*, 831 F.2d 1108 (1987), *cert. denied*, 485 U.S. 1006 (1988)," which involved FDA's *de minimis* exception to the color additive Delaney clause. Br. for the Fed. Resp. in Opp. at 5. Yet, in seeking a stay of mandate they argued that the court of appeals "disregarded the 'virtual[] . . . presumption' in favor of such an exception" set forth in *Public Citizen*. Resp. Motion for Stay at 3; *see also* Resp. Pet. for Reh'g at 8, 11-15 (filed in *Les* Aug. 20, 1992) (arguing at length that the court of appeals erred in its attempt to apply *Public Citizen*'s "extraordinary rigidity" test). Even if, as Federal Respondents now mysteriously and erroneously assert, the Ninth Circuit conducted "the type of analysis that the D.C. Circuit set forth in *Public Citizen*," it was riddled with errors, as Federal Respondents themselves vigorously argued in their petition for rehearing and motion to stay the mandate. Br. for Fed. Resp. at 7; *see* Resp. Pet. for Reh'g; Resp. Motion for Stay at 3-4.

3. Incredibly, Federal Respondents now suggest that "the court of appeals followed the analysis set forth in *Chevron* [*U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984)]," and that "it would not have been appropriate under *Chevron* for the court of appeals to have given deference to the agency's interpretation." Br. for Fed. Resp. at 8. In seeking to stay the mandate, however, they emphatically pointed to the Ninth Circuit's deviation from the

principles set forth in *Chevron* as one of the principal reasons why this case warrants Supreme Court review:

> Most importantly, the Court gave no reason whatsoever for *failing to afford appropriate deference* to EPA's statutory interpretation. The Supreme Court might well find that *failure to defer to EPA's construction contravenes principles announced by the Supreme Court in Chevron*. . .

Resp. Motion for Stay at 4 (emphasis added); *see also* Resp. Pet. for Reh'g at 2 ("the Court misapprehended EPA's main argument in support of the reasonableness of the agency's interpretation of the Delaney clause").

4. Federal Respondents now argue that certiorari should be denied because the impact of the Ninth Circuit's decision may be ameliorated if at some point in the future EPA were to change its policy of banning the use of agricultural pesticides which require, but due to the Delaney clause are ineligible to receive, § 409 tolerances. Recognizing the far-reaching consequences of the court's decision, they argued below however, that "[t]he *impact of the panel's decision is potentially so great* that EPA should not have to respond to the mandate *until the Supreme Court has had an opportunity to fully consider and resolve the important legal issues raised by this court's decision.*" Resp. Motion for Stay at 5 (emphasis added). They explained that the Ninth Circuit's opinion will adversely affect availability of numerous pesticides, and that "[t]his may have the effect of increasing the price of food and decreasing overall food safety." *Id.* at 6; *see also* Resp. Pet. for Reh'g at 3 ("the adverse impact of the Court's decision will be felt by consumers and farmers nationwide, as well as by the food and pesticide industries"). The numerous farm, agricultural commodity, food industry, and trade association *amici* supporting the petition have attested to the potentially devastating consequences of the ruling below. Thus, the Solicitor General's speculation regarding the possibility of some future change in policy is not a legitimate basis for denying review of this critically important case.

5. Finally, Federal Respondents assert that "[t]here is no conflict among the circuits on the question presented in the petition." Br. for Fed. Resp. at 5. That is a spurious basis for opposing review here because this is not the type of case which is amenable to consideration by more than one circuit. The Ninth Circuit held that the *de minimis* exception is unlawful; if the court's mandate issues, EPA will have to abandon the *de minimis* exception. As Federal Respondents repeatedly conceded prior to the filing of their opposition, that could have devastating consequences for the American public, agriculture, and the food and pesticide industries. *See* Resp. Motion for Stay at 5-7; Resp. Pet. for Reh'g at 3.

II. The opposition brief filed by the non-government Respondents, a coalition of anti-pesticide groups and individuals, totally ignores the ramifications of the Ninth Circuit's decision and erroneously argues that certiorari should be denied because the court's decision is "entirely sound." Resp. Br. in Opp. at 4. Their principal contention essentially is that the court of appeals was correct because the Delaney clause "says what it says." In other words, according to Respondents, there can be no *de minimis* exception to the Delaney clause or any other statute in the absence of an express provision to that effect. As this Court has recognized, however, federal agencies have *implied* authority to make *de minimis* exceptions, especially with regard to regulation of insignificant health risks, absent contrary indication. *See Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, 112 S. Ct. 2447, 2458 (1992); *see also Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 663-64 (Burger, J., concurring) (citing *Alabama Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1980)). In attempting to read such a "contrary indication" into the Delaney clause, it is the Ninth Circuit and Respondents, not Petitioner or EPA, which are attempting to rewrite the statute.

Respondents contend that the court of appeals "found such 'contrary indication' to a *de minimis* exception in the 'clear and mandatory language' of the statute." Resp. Br.

in Opp. at 4 (quoting Pet. App. 6a). That begs the question of whether EPA has *implied* authority to refrain from regulating trivial risks, since the Delaney clause does not include an express prohibition *against* a *de minimis* exception. Respondents also refer to the court's legislative history findings. *Id.* at 4. The court's legislative history analysis, however, was limited to enactment of the Delaney clause itself, and completely overlooked congressional statements surrounding enactment and reenactment of FIFRA, and also § 408, FFDCA's pesticide-specific tolerance provision. *See* Resp. Pet. for Reh'g at 8-10. If the court of appeals (or Respondents) had endeavored to review FIFRA's voluminous legislative history, the stark conflict between a literal interpretation of the Delaney clause and Congress' repeatedly expressed intent to regulate pesticides, including those "taken up in the food chain," pursuant to "a careful balancing of benefits versus risk to determine what is best for man" would have been evident. S. Rep. No. 838, 92d Cong., 2d Sess. 1, 4, *reprinted in* 1972 U.S.C.C.A.N. 3993, 3996. Therefore, a proper *de minimis* analysis would have confirmed that there is nothing in the congressional design for regulating pesticides which provides any indication whatsoever that Congress intended the Delaney clause to be extraordinarily rigid with respect to pesticides which merely pose trivial risks.*

Respectfully submitted,

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* Among the erroneous or misleading contentions in Respondents' Statement of the Case is their notion that EPA has "announced" that certain pesticides, including the four involved in Respondents' administrative petition, "did in fact induce cancer within the meaning of the Delaney clause." Resp. Br. in Opp. at 3.